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No. OFFICE OF THE CLERK

In the SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

SHIRLEY AND JASON MCCLURE,

Petitioners,

vs.

THE CITY OF LONG BEACH, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a government official may assert qualified immunity under the federal Fair Housing Amendments Act of 1988 ("FHAA"), which is a comprehensive remedial statute prohibiting discrimination in housing and is equally applicable to both private and public parties?

2. Whether a government official, who intentionally applies a different and harsher standard to enforce the building codes against housing for the handicapped than for residential housing, although the state law deems the standard identical, is entitled to qualified immunity under the FHAA?

3. Whether the head of a Building Department, who told the complainant she could not have an administrative hearing to challenge his decision, is entitled to qualified immunity in a due process claim because there was an ordinance saying that an appeal was available in such a situation and the complainant was represented by counsel?

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IN THE SUPREME COURT OF THE UNITED STATES

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SHIRLEY AND JASON MCCLURE, *Petitioners*,

v.

THE CITY OF LONG BEACH, et al., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Shirley and Jason McClure respectfully petition for a writ of certiorari to review the judgment of the United States Court of appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, A-3 through A-13) is unreported. The opinion of the district court (App., *infra*, A-14 through A-15) is also unreported.

JURISDICTION

The court of appeals entered its judgment on December 20, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case focuses on 42 U.S.C. §§ 3604, subsection (a) and (f), and 3617, of the Fair Housing Amendments Act of 1988 (prohibiting discrimination in housing). The case also involves 42 U.S.C. § 1983 and *California Health & Safety Code* §§ 1569.82 and 1569.85. Each is cited verbatim in the Appendix. (App., *infra*, A-16 through A-25.)

STATEMENT OF THE CASE

Petitioners, Shirley and Jason McClure, sued the City of Long Beach and several Long Beach City officials for damages resulting from their use of City resources to prevent the McClures from establishing residential care facilities for the victims of Alzheimer's disease in Long Beach. The suit sought damages under 42 U.S.C. § 1983, the Fair Housing Amendments Act of 1988 (hereafter "FHAA") and various state law causes of action. The state law claims were dismissed by the district court for lack of pendent jurisdiction. The remaining claims were challenged in several summary judgment motions, both on the merits and, as to the individual defendants, on claims of qualified immunity. The district court denied all of the respondents' claims of qualified immunity. Respondents then filed an interlocutory appeal on behalf of the individual defendants. The court of appeals reversed that decision in part, thereby dismissing some of the individual city officials in total and some in part.

A. Facts

This civil rights action against the City of Long Beach and several of its employees arose from a systematic and organized campaign by the City of Long Beach, its employees, and others acting in concert with them, to prevent

residential care facilities (hereafter "RCFs") for persons afflicted with Alzheimer's disease to open in the wealthy, residential neighborhoods of that City. The individual Long Beach officials harnessed the broad powers of their Building and Planning Department, Police Department, Gas Department, Fire Department and, ultimately, the City Prosecutor's Office to prevent the homes from opening. They accomplished this by pretextually enforcing the City's building and zoning codes. Their actions caused both Shirley and Jason McClure to lose their life savings, which were invested in the properties. Shirley McClure was forced to file for Chapter 11 bankruptcy in early 1992, with this lawsuit being the only substantial asset of the estate.

The events at issue here began in early 1990. At that time, Shirley McClure owned a successful car leasing business and had accumulated five single family homes, some of which had undergone extensive remodeling, located in two upper income areas of Long Beach. During her prior remodeling projects, Ms. McClure had had no problems interacting with the Long Beach Building Department.

In late 1989, Ms. McClure's father was diagnosed with Alzheimer's disease and, because Ms. McClure found strikingly few good care facilities for such victims, she decided to convert her homes to serve as care facilities for those with Alzheimer's disease. She decided to use her extensive resources and excellent credit to start a project that she believed would help both her father and others, along with generating a profit for her and her son. Her son, Jason McClure, then 19 years old, joined with her, working full-time and also investing his own assets.

Under California's Residential Care Facilities Act ("RCF Act"), *California Health and Safety Code* §§ 1569.82

and 1569.85, localities are mandated to encourage the development of RCFs for the elderly, and are required to apply the same standards to such homes with six or less people in single family residence zones as to single family residences. California law preempts any local zoning ordinances which would either prevent the establishment of such a facility in a residential community or require special provisions for them. As may be expected, the law has upset many residential homeowners who fear the loss of their property values.

Ms. McClure submitted six applications to the State licensing agency in the Spring of 1990 and began to remodel the homes to accommodate four to six residents in each home. Ms. McClure's homes were much nicer than the average RCF and were in more upscale neighborhoods. In addition to remodeling, she began to equip the homes so as to meet all of the health and safety requirements of the State for such homes. The State is solely responsible for such licensing; however, it contracts the issuance of fire clearances to local communities.

Ms. McClure did not initially inform her neighbors of their intentions to convert the homes into RCFs. She did contact several City Officials, including City Councilman Jeffrey Kellogg, a defendant, to enlist their support in her project. Until her neighbors started to complain. Ms. McClure received no resistance from Long Beach City Officials, and, in fact, Mr. Kellogg agreed to speak at the opening of the first home.

As Ms. McClure's neighbors began to learn of the McClures' plans, many started to protest. They did not want Alzheimer's victims living in their upscale community and they believed, contrary to California law, that zoning

prohibited such businesses from being established in their neighborhood. The most wealthy residents of Long Beach began to put tremendous pressure on their City Councilmen and on the Building Department to stop the project.

In July of 1990, the neighbors organized and presented a petition to the City Council. At that meeting, several neighbors expressed their opposition to the homes. The City officials knew that they could not directly stop the homes. The City Council members expressed the view that they could not directly stop the homes because it would violate the law but indicated that they could "vigorously enforce" the building codes.

At that same meeting, the Superintendent of Building and Safety, defendant Eugene Zeller, stated that Ms. McClure's fences were too high even though he admitted that the Long Beach Fire Department had told him that State law required such height fences. Mr. Zeller made clear that his department would make sure that Ms. McClure complied with all of Long Beach's building and zoning requirements, even if those requirements were contradicted by state law. In fact, Councilman Kellogg's office noted in a memo, "Zeller promises to follow -- enforce all City Codes. Unless codes are violated, we have no recourse." Councilman Grabinski, whose district also contained some of the homes, stated, "[W]e are trying to cite her [McClure] on building codes."

In the meantime, Ms. McClure was progressing with her project. Despite problems with one of her contractors, whom she fired, the first home was almost ready to open by June, 1990. In fact, the Long Beach Fire Department had already issued her a fire clearance and the State was ready to conduct its final safety inspection.

On the morning of the July 24, 1990 City Council meeting, two building inspectors barged into Ms. McClure's construction office in one of her garages and accused her of illegally converting her garage. Ms. McClure stated to them that she had had trouble getting inspections completed. She asked the inspectors to go with her to each of her homes to do an immediate inspection so that she would be aware of any things that needed to be done and have a record of the buildings' condition to use in a dispute with her prior contractor, which they did. The inspectors, who were from zoning and not the building department, looked at all of the homes and promised to return at a later date.

After the July City Council meeting, Mr. Zeller unleashed his building inspectors to inspect each home and look for things for which Ms. McClure could be cited. The objective was to ensure that the homes did not open. The day after the Council meeting, defendants Gatoff and DeAngelo went to the McClure homes without calling to schedule an appointment, contrary to normal Departmental procedure. This was after Ms. McClure had complained of the unannounced intrusion the day before and Mr. Zeller had personally promised to call her before any more inspections occurred.

The inspectors arrived at one of Ms. McClure's homes. They told Jason McClure to immediately stop construction on the fence in the front because it was too high, even though Jason pointed out that several houses across the street had higher fences (a matter regarding which the Department never did anything). They demanded immediate entry from Jason, who was only 19 at the time. Jason indicated that he would allow entry, but wanted to wait for his mother, who was expected shortly, to arrive. Instead of

waiting, the building officials simply wrote that they were being refused entry. Though Ms. McClure arrived while the inspectors were still on the premises, the inspectors refused to do the inspection on the grounds that they had already been denied entry.

The next day the City Prosecutor went into court to obtain an inspection warrant; the warrant application relied on one of the inspectors' affidavit contending they had been refused entry. At the same time, the Building Department issued a general stop work order on all of McClure's properties and suspended all of the building permits.

After obtaining the warrant, the inspectors called Ms. McClure and told her that, if she would accept service of the warrant and schedule an inspection date, they would not post the warrant at the properties. Though Ms. McClure complied with their request, the inspectors posted the warrant anyway.

A few days later, the Building Department conducted an extensive inspection with which Ms. McClure fully complied. They wrote a multi-paged list of so-called violations, many of which were minor problems that had existed for years. While there were, indeed, some building code "violations" at the homes, this was not unusual for an ongoing construction project. It was not the practice of the Long Beach Building Department to suspend or revoke permits in such situations.

The homes were in varying states of completion -- one home was almost ready for final inspection, whereas another of the homes was completely demolished and entirely fenced off. Nevertheless, the Building Department lumped them all together and made approval of work on any one of them conditional on approval of the work planned for

all, a practice not followed in any other situations. It revoked the permits on all of the homes and stated that it would not reissue any new permits unless Ms. McClure provided extensive architectural plans which are normally not required for the type of work they were doing. It also wrote to the Fire Department and told them to revoke the fire clearance. And, although the Fire Department had already inspected the homes, had issued one Fire Clearance and had approved the issuance of others; the Fire Department complied with the Building Department's request. Ms. McClure could not open any of the homes without the fire clearance.

Things only got worse. The building officials met with the Police Department and told it that absolutely no work could be conducted on the McClure homes. A police officer stated that he was told by Inspector Liddicoat, a defendant, that no work could take place on any of the properties other than painting. That was said despite the fact that much work on a property - including, landscaping, paneling, tiling and flooring - does not require a building permit. As a result, Ms. McClure was constantly harassed by the police when doing work which did not require a permit, and she and her workers were threatened with arrest several times.

One of the neighbors worked for the Long Beach Gas Department, defendant Clifford Ashton. He and the building officials made sure that Ms. McClure's gas and utility services were cut off at two of her homes, including the home in which she was living, without providing any notice or hearing. When Ms. McClure asked Mr. Zeller, the Superintendent of Building and Safety, the procedure for appealing these decisions, she was told that she could not

appeal because the actions were ministerial and were not reviewable.

Eventually, the Building Department recommended criminal prosecution, including prosecution for the overheight fences that the building officials knew were requested by the Fire Marshall in order to comply with the requirements for a residential care facility of the type the McClures were planning. Criminal charges were filed against the McClures. Building code offenses are routinely handled first through a City Attorney conference and then a diversion. but Ms. McClure was never provided with either option; instead, she was formally prosecuted from the beginning and was offered neither a City Attorney hearing nor a diversion. After Ms. McClure lost her homes to foreclosure, the new owners were never cited for the "violations" for which Ms. McClure had been cited even where the violations had not been corrected years later. Where permits were issued to new owners, the new owners were not required to submit the type of expensive, architectural plans that Ms. McClure had been required to submit. Permits identical to those which had been utilized by Ms. McClure, the scope of which she had been accused of exceeding, were approved by the Building Department for work as extensive or more extensive than was undertaken by Ms. McClure.

The testimony of the City's representatives indicated that this case was unique in its history in several respects. This case was the first time, to the designated

representatives' knowledge, that, in the applicable area of construction regulation[1]:

- Gas or electric meters had been removed.[2]

- A property had been declared substandard and a nuisance.

- An inspector had gone to the property and demanded entry without prior knowledge by the owner.

- A case had been referred for prosecution.

- A case had actually been prosecuted.

- All work had been generically stopped, as opposed to a notice directing a stop only for certain specific work or until a permit was obtained if the work was proceeding without a permit.

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[1] The Building Department has two areas of regulation - construction regulation and code enforcement. Construction regulation has to do with buildings which are presently undergoing any kind of construction; code enforcement involves buildings which are not in construction. The difference between the two is self-explanatory; the concept of a code "violation" for construction activity is an oxymoron since the role of inspectors in that situation is generally to advise the owner what has to be done for the Building Department to sign off on the construction as properly completed. The McClure buildings were all under the purview of construction regulation because they were all in some state of construction.

[2] Even in code enforcement, which has to do with buildings not in construction, this was the first time a meter was physically removed where the owner had previously shut off the meter.

- A stop work order on a ramp or a guard rail had been issued.[3]

- A hard hold (which prohibits an inspector from allowing any work to proceed) had been issued on more than one property simultaneously.

Because of the pressure and inability to open any of the homes, Ms. McClure lost all of the homes to foreclosure. Only after foreclosure were the criminal prosecution dismissed. As all of Ms. McClure's financial resources were wrapped up in the project, she was forced to declare bankruptcy. Her only real asset left is this lawsuit.

B. Proceedings Below

On May 7, 1992, the previously lodged complaint for damages and injunctive relief in this case was filed in the United States District Court; it was subsequently removed to the United States Bankruptcy Court due to petitioner McClure's pending Chapter 11 proceeding. In late 1992, the case was remanded to the United States District Court, and an amended complaint was later filed. The case was subsequently removed to the United States District Court. The district court subsequently denied a motion to dismiss, but on its own motion, dismissed the pendent state claims.

On March 4, 1994, three days after the discovery cut-off date, each of the eleven defendants (only seven are parties to this appeal) filed a separate motion for summary judgment

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[3] Because these homes were for elderly people with Alzheimer's disease, ramps and guard rails were needed; the Building Department did not normally require permits for them, but did for the McClures.

on the merits and qualified immunity. The motions failed to distinguish the factual claims appropriate for resolution on the merits, as opposed to, on qualified immunity grounds.

On November 29, 1994, the district court entered a written order granting in part and denying in part the summary judgment motions. The only part of the motions which were granted were those made by defendants who were first named when the amended complaint was filed.[4] The trial court dismissed the §§ 1985, 1986 and 1983 claims against the seven later named defendants, but not those under the FHAA, apparently on the ground that the statute of limitations had run for them on all claims except the FHAA. As a result, the §§ 1985, 1986, 1983 and FHAA claims remained against defendants City of Long Beach, Kellogg, Grabinski and Zeller; only the claims arising under the FHAA remained against the other individual defendants. The court set forth no reasons for its decision.

The individual defendants appealed to the Ninth Circuit, which, based upon this Court's opinion in *Johnson v. Jones*, ____ U.S. ____, 115 S.Ct. 2151, 2156 (1995), refused

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[4] There were originally 10 individual defendants. Three - Kellogg (City Councilman), Grabinski (City Councilman) and Zeller (Superintendent of Building and Safety and the "building official" as defined under the Long Beach Municipal Code) - were named in the original complaint. The other seven were first named in the amended complaint. Two of those, Building Department inspectors Westerhoff and McNicholl, were voluntarily dismissed by plaintiffs. Of the remaining five, Gatoff and DeAngelo were the building inspectors who inspected the McClure properties and issued most of the violations; Liddicoat was their supervisor and directed several inspections of the properties; Sutton was Mr. Liddicoat's supervisor; and Clifford Ashton was a neighbor of the McClures who worked for the Long Beach Gas Department. Thus, the appeal involved eight individually named defendants.

to decide any of the fact based disputes under the § 1983 equal protection claims and denied qualified immunity on the equal protection claims based on *Armendariz v. Penman*, 75 F.3d 1311 (1996). The court of appeals granted qualified immunity to all the individual defendants on the FHAA claims, reasoning that, in 1990, there was no established case law determining what "to make housing unavailable" meant in 42 U.S.C. § 3604(f)(1) and what "reasonable accommodation" meant under 42 U.S.C. § 3604(f)(3). It also granted qualified immunity on the due process claims and the 42 U.S.C. §§ 1985 and 1986 claims. The result was to dismiss all of the individual claims except the equal protection claims against the three originally named defendants, Kellogg, Grabinski and Zeller.

REASONS FOR GRANTING THE PETITION

I. CLARIFYING THE LAW OF QUALIFIED IMMUNMITY UNDER THE FAIR HOUSING AMENDMENTS ACT IS IMPORTANT.

This petition should be granted to decide whether qualified immunity is applicable at all under a statute of general applicability like the FHAA, which sets standards of conduct generally and equally applicable to private and governmental actors. The McClures contend that qualified immunity is inappropriate under a comprehensive remedial statute such as the FHAA, which applies equally to government officials and private individuals. Unlike § 1983, a one paragraph statute which imposes liability for the full range of constitutional claims based upon decades of case law, and which is applicable only to government actors, the FHAA has plain and detailed statutory language, comprehensive regulations, extensive legislative history, and decades of enforcement to define its norms for both private

and governmental actors. There is no sound reason to require individual case law to impose liability under the FHAA. This court should address and resolve that issue, which will arise time and again until it does.

This petition also raises important questions because the court of appeals advanced the disturbing notion that, as of 1990, it was unclear whether the FHAA "makes it unlawful for an official to enforce, with a discriminatory motive, the building code for violations of the code by a property owner who planned to open up the building as housing for the handicapped." (App., *infra*, A-9) The court was in essence saying that it was unclear that discriminatory enforcement, done with a discriminatory motive, violated the statute. The failure to reasonably accommodate was also dismissed by the court of appeals out of hand although its language, while new to the FHAA, had existed under the Rehabilitation Act of 1973 for over 15 years. These conclusions ignore the plain meaning of the FHAA, decades of case law interpreting the applicable law prior to 1988 and common sense.

In essence, by requiring additional case law after Congress enacts an amendment to a statute that has a clear meaning and history, government officials are given a several year window of immunity until the courts revisit each issue which they have already mined in the context of the statute before its amendment. That is far from the Congressional intent and distorts qualified immunity into a shield government for officials who violate clearly established law and societal norms. This court should grant this petition in order to make clear whether the 20 years of established law under the FHAA prior to its amendment in 1988 is applicable to housing discrimination against the handicapped, and whether, similarly, the body of case law under the

Rehabilitation Act of 1973 is applicable to the FHAA's "reasonable accommodation" clause.

In this case, the Long Beach officials are accused of using the power of their offices as a pretext to prevent homes for the handicapped from opening in wealthy areas of their City, and applying a clear and unequivocal double standard although the state law required them to utilize the same standard.[5] Even if qualified immunity were appropriate under certain circumstances, this Court should address whether, since the Court of Appeals recognized that the conduct alleged violated well established equal protection standards, it was similarly sufficient to trigger the FHAA's prohibition against intentional discrimination in housing.

The questions presented by this petition should be addressed by this Court to resolve a growing problem in civil rights litigation - whether the doctrine of qualified immunity has been construed so elastically that its application allows government officials to violate well established legal standards, with the effect of undermining respect for the law. This cannot have been this Court's intent in granting government officials the right of qualified immunity nor Congress' intent in enacting the FHAA.

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[5] We are not suggesting that a violation of the state law establishes that the FHAA was violated, but that the fact that state law required that the homes be treated as single family residences for zoning purposes means that singling out the homes for different treatment is facially discriminatory.

II. CONTRARY TO THE COURT OF APPEALS' DECISION, QUALIFIED IMMUNITY SHOULD NOT BE PERMITTED UNDER A COMPRHENSIVE REMEDIAL STATUTE SUCH AS THE FHAA, WHICH EQUALLY APPLIES TO GOVERNMENT AND NON-GOVERNMENT OFFICIALS.

The FHAA is applicable to both private parties and municipalities equally. *See Keith v. Volpe*, 858 F.2d 467, 482 (9th Cir.), *cert denied*, 493 U.S. 813 (1988). By its terms, the FHAA does not restrict municipal liability in any way. *See, e.g., United States v. City of Blackjack*, 508 F.2d 1179, 1183-84 (8th Cir.), *cert. denied*, 422 U.S. 1042, (1974); *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (en banc). Thus, unlike § 1983, respondeat superior applies to FHAA claims against municipalities. *Bonner v. Lewis*, 857 F.2d 559, 566 (9th Cir. 1988) ("with the exception of § 1983, the general rule regarding actions under civil rights statutes is that respondeat superior applies ... [and has been applied to] Title VIII of the Fair Housing Act of 1968").

The law of qualified immunity is based primarily on 42 U.S.C. § 1983, a broad-based statute authorizing "constitutional torts" to which well-established common law tort immunities apply. *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Congress intended such tort immunities to apply when it enacted § 1983. *City of Newport v. Fact Concerts*, 453 U.S. 247, 258 (1981). Unlike the FHAA, § 1983 only applies to governmental conduct. Further, § 1983 is only a paragraph long and essentially provides tort remedies for all constitutional violations. Given the breadth of the statute and its exclusive focus on governmental actors, there were strong policy reasons to apply the common law immunities

available at the time of its enactment. There is no corresponding policy reason to apply qualified immunity to a comprehensive statutory enactment such as the FHAA, nor is there any reason to believe that Congress intended to apply a different standard of liability for individual private actors than for individual public actors, which is the practical effect of applying qualified immunity under the FHAA.

Additionally, qualified immunity is necessary under § 1983 because the courts are the interpreters of the Constitution and the contours of constitutional law change over the years. Thus, qualified immunity is an attempt to prevent officials from being unfairly subjected to a changing legal landscape. However, the cases defining qualified immunity have been careful to note that it is the contour of the right that must be defined, not the specific factual scenario. *E.g., Anderson v. Creighton*, 483 U.S. 635 (1987).

Where there is a comprehensive statute that imposes respondeat superior liability, as here, qualified immunity makes no sense. Unlike § 1983, which incorporated a broad array of constitutional and statutory protections within its compensatory scheme, the FHAA spells out in detail its provisions and requirements, and is buttressed by a comprehensive set of regulations. There is no more reason to allow an individual governmental employee to assert immunity than for a private employee or, for that matter, a private entity. The statutory scheme is the same.

Indeed, if one examines § 1983 qualified immunity decisions where the issue is enforcement of federal statutory rights, it is apparent that the concept of qualified immunity makes no sense in the context of statutory rights. *See, e.g., Jackson v. Rapps*, 947 F.2d 332 (no qualified immunity to defendant officials because they acted in violation of an

unambiguous federal statute and implementing regulations), *cert. denied*, 112 S.Ct. 1561 (1991); *Del A. v. Edwards*, 855 F.2d 1148 (the only pertinent inquiry is whether a reasonable official would know how the statute required the official to act), *reh'g granted*, 862 F.2d 1107 (5th Cir. 1988).

Although some courts, other than the court of appeals in this case, have applied qualified immunity in a claim raised under the FHAA, *See e.g., Meadowbriar Home for Children, Inc. v. Gunn* 81 F.3d 521 (5th Cir. 1996) (granting qualified immunity on similar grounds), none has addressed whether qualified immunity is appropriate under a comprehensive remedial statute such as the FHAA.

No court has addressed whether, when Congress enacts a comprehensive statute, it must first be subjected to court interpretation before government officials should be held liable. Even if, under some circumstances, a comprehensive law could be subject to varying interpretations, there is certainly no basis for a court to ignore the Congressional intent, legislative history, analogous statutes and the history of the very statute in question when determining whether the law was clearly established, an issue to which we now turn.

III. THE GOVERNMENT OFFICIALS BELOW WERE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEY VIOLATED CLEARLY ESTABLISHED LAW AND THE UNLAWFULNESS OF THEIR CONDUCT WAS APPARENT.

A. So Long As the Contours Of A Right Are Clear, A Government Official is Charged With Knowledge Not To Violate It.

Qualified immunity is unavailable to individual government defendants who violate "clearly established" law which a defendant, in the absence of extraordinary circumstances, has a duty to know. *Harlow v. Fritzgerald*, 457 U.S. 800, 818 (1982). To determine whether the law is "clearly established", a plaintiff must only show that "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3039 (1987). The specific action in question need not previously have been held unlawful, but "in the light of preexisting law the unlawfulness must be apparent." *Id.* The law may be clearly established even in the absence of case law if "well established principles dictate" such a conclusion. *Ostlun v. Bobb*, 825 F.2d 1371, 1374 (9th Cir.), *cert. denied*, 486 U.S. 1033 (1987).

Here the contours of the right prohibiting intentional discrimination by government officials against those classes of people protected by the FHAA was well established prior to 1990. *See, e.g., Huntington Branch, National Association for the Advancement of Colored People v. Town of Huntington*, 844 F.2d 926 (2d. Cir.), *aff'd*, 488 U.S. 15, 109

S.Ct. 276, 102 L.Ed.2d 180 (1988) (per curiam). *See also, infra.*, at fn. 5.

The Fair Housing Act was enacted in 1968 and prohibited discrimination based on race, color, religion, or national origin. Congress added protection for discrimination based upon sex in 1974 and, in 1988, added protection for the handicapped and families. *See generally, City of Edmonds v. Oxford House, Inc.*, _____ U.S. _____, 115 S.Ct. 1776, 1778, 131 L.Ed.2d 801(1995); 42 U.S.C. § 3601, *et seq.*.

Three provisions of the FHAA are particularly relevant to this case. Section 3604(f)(1) states that it is unlawful to "make unavailable or deny a dwelling" because of a handicap. Section 3617 holds liable persons who have "coerce[d], intimidate[d], threaten[d] or interfere[d]" with those exercising their rights under the FHAA or those aiding others in the exercise of such rights. Section 3603(f)(3)(B) defines handicap discrimination to include "a refusal to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."

In enacting the FHA in 1968, Congress intended to prevent all citizens, including government officials, from preventing protected groups' enjoyment of the benefits of free and fair housing. Thus, "[t]he phrase 'otherwise make unavailable' has been interpreted to reach a wide variety of discriminatory housing practices, including discriminatory zoning." *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 424 (2nd Cir.), *cert denied*, 116 S.Ct. 2546 (1995), citing *Huntington Branch, supra*, 844 F.2d at 938. *See also* 114 Congressional Record 2277, 2698-2703 (1968) (remarks of Senator Mondale noting that Title VIII was intended to "undo

the effects of these past state and federal unconstitutionally discriminatory actions").

In amending the FHA in 1988, Congress emphasized that the FHAA was "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." *Helen L. v. DiDario*, 46 F.3d 325, 333 n.14 (3d Cir.) (quoting H.R. Rep. No. 711, 100th Cong., 2d Sess. 18, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179), *cert. denied*, ____ U.S. ____, 116 S.Ct. 64, 133 L.Ed.2d 26 (1995). The House Report noted that the FHAA "is intended to prohibit the application of special requirements through land-use regulations ... that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community." H.R. Rep. No. 711, 100th Cong., 2d Sess. 24, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185.

It is disingenuous for the court of appeals to claim that a reasonable official would not have known in 1988 that he could not intentionally apply the building codes in a discriminatory manner so as to prevent housing for the handicapped. The plain language and legislative history of the FHAA made clear that it was meant to prevent government officials and entities from applying their building and zoning regulations to prevent housing for the handicapped. Well before 1988, it was clear that such discriminatory actions were prohibited.

B. It Was Clearly Established Prior to 1990 That "To Make Housing Unavailable" Included Discriminatory Application of Building and Zoning Codes.

The language in 42 U.S.C. § 3604(f)(1) that it was unlawful to make housing unavailable was lifted directly from § 3604(a), which had been in existence since 1968. It was Congress' intent in lifting that language to afford protection "to handicapped persons and families with children in the same manner as the protections provided others under the Fair Housing Act." 24 C.F.R. Ch I, Subch. A, App 1 at 691.[6]

In addition to *Huntington Branch, supra*, several other cases have utilized § 3604(a) to hold government officials and entities liable for discriminatory application of local codes.[7] Prior to and during 1990, several courts found

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[6] § 3604(a) prohibits discrimination against "any person" while § 3604(f)(1) prohibits discrimination "directed against handicapped buyers and renters and those who reside or are associated with them." The difference was "to make clear that the law does not condemn housing that is available especially *for* handicapped people and their associates (i.e., that 'reverse discrimination' suits against such housing by non-handicapped persons are not authorized)." Schwem, *Housing Discrimination*, § 11.5(3)(a). That is, the law, in effect, permits discrimination in favor of the handicapped, unlike § 3604(a), which does not permit discrimination in favor of its protected groups.

[7] *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977); *Keith v. Volpe*, 858 F.2d 467, 482 (9th Cir. 1988); *United States v. Yonkers Board of Education*, 624 F.Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2nd Cir. 1987), *cert. denied*, 468 U.S. 1055 (1988); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2nd Cir. 1987); *Resident Advisory Board v. Rizzo*, 564 F.2d 126(3d Cir.), *cert. denied*, 435 U.S. 908 (1977); *United States v.*

similar liability under § 3604(f)(1). *Baxter v. City of Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989); *Ass'n of Relatives & Friends of AIDS Patients (A.F.A.P.S.) v. Regulations & Permits Admin.*, 740 F. Supp. 95 (D. P.R. 1990).

Liability is particularly clear in this case because California law is absolutely clear that the Long Beach officials were required to treat the care facilities as single family dwellings for all zoning and building purposes, *Cal. Health & Safety Code* § 1569.85 (exempting all residential care facilities of six or less persons from zoning and building requirement not applied to all single family dwellings). Thus, Long Beach subverted the clear terms of that law by applying the building and zoning codes in a discriminatory manner. It is hard to imagine that a reasonable building official would not know that doing so violated both equal protection standards and the FHAA.

The court of appeals, in arguing that the law is unsettled, relied on cases such as *Michigan Protection and Advocacy Service, Inc. v. Babin* 18 F.3d 337, 344-45 (6th Cir. 1994). However, in that case, the issue involved protesting neighbors who had no direct control over the disposition of the premises. Thus, the court concluded that the conduct at issue did not constitute making housing unavailable. However, where a government official, with a discriminatory motive and effect, directly stops all work on a house, sends the police to prevent lawful work, revokes a necessary fire

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City of Birmingham, 538 F.Supp. 819, 828 (E.D. Mich.), *cert. denied*, 469 U.S. 821 (1982); *Hanson v. Veterans Administration*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1068 (4th Cir. 1982).

clearance, cuts utility service, requires things of the owner that are never required in any other situation, and institutes criminal charges for the first time in the Department's history for construction related activity, the government official clearly has direct influence over the disposition of the property.

These facts also distinguish this case from *Meadowbriar, supra,* 81 F.3d at 530. In that case, a non-profit home for children sued city officials and the leader of a citizens group under the FHAA. The Fifth Circuit granted the city officials' qualified immunity claim on similar grounds to the Ninth Circuit here. However, in that case, the court conceded that a city official could be liable for making a dwelling unavailable. Here the Ninth Circuit ruled that no city official in 1990 could be held liable because the law was unsettled. The *Meadowbriar* court determined that the particular city officials in question did not have the power to affect the disposition of the property and, thus, were not "in a position to directly effectuate the discrimination." *Id.* at 531. That is certainly not the case here, where the plaintiffs' claims are precisely that the officials in question had and exercised such authority. In addition, the *Meadowbriar* court noted that the city officials were not accused of "discriminatory animus," *id.* at n. 7, whereas discriminatory animus is alleged against all of the city officials here.

The Ninth Circuit opinion sweeps the qualified immunity brush far too broadly by the breadth of its definition of conflicting law. On the facts presented, there is no conflict because intentional discrimination by government officials has always been prohibited by the FHA and its progeny, the FHAA.

The court of appeals also makes an issue of the fact that the prior cases imposing government liability did not hold individuals liable. That fact is irrelevant to qualified immunity. If the law clearly established that an entity may not prevent the opening of a residential care home through the discriminatory use of its police powers, then the individual official had the notice that s/he needed. Qualified immunity is not directed to whether or not there is liability under a particular cause of action, but whether the conduct is reasonably known to be unlawful. *Del A. v. Edwards*, 855 F.2d 1148 (5th Cir.), *reh'g granted*, 862 F.2d 1107 (5th Cir. 1988) (holding that whether a private right of action exists under a particular statute is irrelevant for a qualified immunity determination; the only pertinent inquiry is whether a reasonable official would know how the statute or case law required the official to act). Thus, if it is unlawful for a government entity to intentionally discriminate, it is equally unlawful for an individual government actor to do so.

C. It Was Clearly Established Prior to 1990 That The Conduct Alleged Violated 42 U.S.C. § 3617.

The court of appeals dismissed the claim under § 3617 by stating that no case law applied the section to the handicapped. That statement reveals the danger of the court's ruling. The plain language of the statute is that *nobody* can coerce or intimidate another in the exercise of rights protected by the FHAA. By focusing on mere code enforcement and ignoring the allegations regarding repeated harassment and intimidation, the court of appeals simply ignored the claim under § 3617. The real question is not whether any case law has ever held a government official liable under §3617, but whether the conduct alleged would

reasonably be understood to rise to the level of coercion or intimidation. As to that issue, the court of appeals is silent while the facts alleged are plainly sufficient for a jury to conclude there was a violation of the statute.

D. It Was Clearly Established Prior to 1990 That The Conduct Alleged Violated The FHAA's "Reasonable Accomodations" Clause, 42 U.S.C. § 3604(f)(3).

The court of appeals simply ignored the reasonable accommodations claim by stating that no law prior to 1990 discussed such a claim. However, that facile analysis ignores the basis of a reasonable accommodations claim. Several courts have noted that the "reasonable accommodations" language of § 3604(f)(3) was directly lifted from § 504 of the Rehabilitation Act of 1973. *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802, 805 (9th Cir. 1994). The House Report on the FHAA's "reasonable accommodations" provisions directly cited this Court's ruling in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (holding that "a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped" under § 504 of the Rehabilitation Act). The same report noted, "The concept of 'reasonable accommodation' has a long history in regulations and case law dealing with discrimination on the basis of handicap." H.Rep. No. 100-711, 1988 U.S.C.C.A.N. 2186, 2189-90. See also *Brandt v. Village of Chebanse*, 82 F.3d 172 (7th Cir. 1996)("'[r]easonable accommodations' is a term in many federal regulations and statutes, a term with an accepted meaning"). As a result the courts "have uniformly concluded that the standards for 'reasonable accommodation' developed under § 504 of the Rehabilitation Act also apply to §

3604(f)(3)(B)." *Bryant Woods Inn, Inc. v. Howard County, Md.*, 911 F.Supp. 918, 940 (D. Md. 1996).[8]

Under the Rehabilitation Act, it had been established well before 1990 that an employer had an affirmative obligation to make reasonable accommodations for the handicapped. Any accommodation that does not create an undue hardship on the employer is reasonable. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287-289, n. 17, 19., *reh'g denied*, 481 U.S. 1024 (1987).

Since 1990, courts have uniformly interpreted the FHAA's "reasonable accommodation" clause to require an affirmative duty to tailor local land use and health and safety laws to avoid excluding group living arrangements for the handicapped. *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802, 805 (9th Cir) (refusing to exclude local zoning law which precluded group homes for the handicapped in single family neighborhoods from the reach of Title VIII), *aff'd* 115 S.Ct. 1776 (1994); *United States v. California Mobile Home Park Management Co.*, 29 F.3d 1413, 1416 (9th Cir. 1994) (declaring unlawful residency and parking fees for additional guests in a mobile home park where a resident required live-in help). Such a reading of the FHAA's "reasonable accommodation" clause is a straightforward and logical application of the existing

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[8] *See also Shapiro v. Cadman Towers, Inc.* 51 F.3d 328, 334-35 (2d Cir. 1995); *United States v. California Mobile Home Park Management Co.* 51 F.3d 1413, 1417 n. 3 (9th Cir. 1994); *Smith & Lee Associates, Inc. v. City of Taylor*, 13 F.3d 920, 930 (6th Cir. 1993); *Judy B. v. Borough of Tioga* 889 F.Supp. 792, 798 (M.D. Pa. 1995); *Erdman v. City of Ft. Atkinson*, 84 F.3d 960, 962 (7th Cir. 1996); *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995).

law in the area. There is no need for a plaintiff to wait for additional court decisions to hold a city official liable for a blatant failure to reasonably accommodate.

Not only do plaintiffs allege a failure to reasonably accommodate, but they accuse Long Beach officials of selectively applying minor zoning violations, such as overheight fences, so as to prevent homes from the handicapped from opening. They made this decision even after the Superintendent of Building and Safety admitted in a City Council meeting that such a fence height was required by the State Fire Marshall. Applying qualified immunity to facts such as those here sends a message to government officials that they have a license to violate the law even when they know or reasonably should know that their conduct was prohibited by the FHAA.

IV. WHETHER A CITY OFFICIAL'S DENIAL OF A PARTY'S RIGHT TO AN ADMINISTRATIVE APPEAL TO WHICH SHE WAS ENTITLED VIOLATES PROCEDURAL DUE PROCESS IS AN IMPORTANT QUESTION TO THE ADMINISTRATION OF JUSTICE.

Finally, this Court should grant certiorari to address the important question of whether a governmental authority's instruction to a citizen that she has no administrative recourse to appeal his decision denies her procedural due process rights, even though the relevant statute provides for an appeal which she did not pursue because she was told she could not.

The court of appeals decided that the McClures were barred from raising violations of procedural due process because they failed to avail themselves of the remedies provided in the Long Beach Municipal Code ("LBMC"). It

did so by concluding that the officials who denied the appeal "were not charged with implementation of the remedy itself." That is a disputed fact. Mr. Zeller -- the head of the Building Department and the "building official" as defined by the LBMC -- clearly and unequivocally denied the McClures the right to an appeal.

He did not merely "mislead" the McClures. Mr. Zeller, who was designated by the City of Long Beach and all of the individual defendants as the person most knowledgeable regarding the building codes, testified that, as the building official, he had the discretion to determine whether or not an appeal would go to the Board of Examiners Appeal and Condemnations ("BEAC"). Mr. Zeller did not merely say that such an appeal would be denied; his testimony, as the City's representative, was that the Board would simply refuse to hear such an appeal. Thus, whatever is stated in the LBMC, the practice in Long Beach was that Mr. Zeller had the power to decide whether an appeal would be heard and that, even if the appeal had reached the Board, it would have been summarily denied, as the LBMC grants the building official the power to "promulgate, adopt and enforce reasonable rules and regulations amplifying or clarifying the provisions [of the building codes]." LBMC. § 18.20.070.

Given Mr. Zeller's position and direct statements to Ms. McClure, an appeal would have been futile. The McClures were not required to pursue a futile appeal. *See, e.g., Herrington v. County of Sonoma*, 834 F.2d 1488, *as amended*, 857 F.2d 567, 570, n.2 (9th Cir. 1988) (no need to pursue administrative appeal where remedy already denied and appeal would be futile). The cases cited by the court of appeals are inapplicable. In *Kerley Industries, Inc. v. Pima County*, 785 F.2d 1444 (9th Cir. 1986), the plaintiff sued

because his permit was voided by an official who had no power to do so. Thus, the permit was never properly voided, and the plaintiff could have continued to operate. Here, the McClures' permits were indisputably voided by persons who had such power. And, as noted, the appeal was denied by the head of the Building Department, whose testimony established that he had the power in practice to deny such an appeal.

The McClures are entitled to pursue their procedural due process claim both because the testimony of the building official demonstrates that an appeal was futile and because that same building official actually denied the appeal in question, and had the power to do so under the practice followed by Long Beach.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHIRLEY and JASON McCLURE,

Plaintiffs-Appellees

vs.

CITY OF LONG BEACH,

Defendant

and

JEFFREY KELLOGG; RAYMOND GRABINSKI; EUGENE J. ZELLER; CLIFFORD ASHTON; WILLIAM GATOFF; MARTIN DEANGELO; HAROLD LIDDICOAT; MARK SUTTON,

Defendants-Appellants.

No.:94-56772

D.C. No. CV 92-2776 JSL

ORDER

(Argued and submitted Nov. 16, 1995. Decided June 28, 1996. Withdrawn Dec. 20, 1996. C.D.Cal. DISMISSED IN PART, REVERSED IN PART.)

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE CENTRAL DISTRICT OF CALIFORNIA, D.C. NO. CV-92-2776-JSL (JK); SPENCER J. LETTS, DISTRICT JUDGE, PRESIDING.

Before: HALL and NOONAN, Circuit Judges, and PRO,[9] District Judge.

The memorandum disposition filed on June 28, 1996, is hereby withdrawn and the attached 11-page amended memorandum disposition is filed in its stead.

The panel has voted to deny appellees' petition for rehearing. Judges Hall and Noonan have voted to reject the suggestion for rehearing en banc and Judge Pro has recommended rejection.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App.P. 35.

With the filing of the amended memorandum disposition the petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Appellees' motion to file supplemental excerpts of record is DENIED.

MEMORANDUM[10]

Before: HALL and NOONAN, Circuit Judges, and PRO,[11] District Judge.

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[9] Honorable Philip M. Pro, United States District Judge for the District of Nevada, sitting by designation.

[10] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Defendants-Appellants Martin DeAngelo and other officials of the City of Long Beach appeal from the district court's order denying them summary judgment based on qualified immunity. In part, we lack jurisdiction to hear the appeal. To the extent that we have jurisdiction, we find appellants entitled to qualified immunity on certain claims.

I.

Defendants-appellants Martin DeAngelo, William Gatoff, Mark Sutton, and Harold Liddicoat are all employees of the Long Beach Building department. The only claims remaining against these defendants are for violations of the Fair Housing Act. Jeffrey Kellogg and Raymond Grabinski are Long Beach City councilmen; Eugene Zeller is the Superintendent of the city's Building Department. The district court denied their motions for summary judgment in their entirety; thus, they are still facing claims for violations of 42 U.S.C. §§ 1983, 1985, and 1986 and violations of the Fair Housing Act.

As a preliminary matter, we note that we do not have jurisdiction over two of appellants' claims. First, they contend that the McClures failed to raise a genuine issue of material fact as to whether appellants violated the McClures' rights under the Fair Housing Act. Second, appellants argue that the McClures failed to raise a genuine issue of material fact as to whether appellants deprived them of equal protection of the law. Both claims involve determinations about the sufficiency of the evidence and therefore cannot be

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[1] Honorable Philip M. Pro, United States District Judge for the District of Nevada, sitting by designation.

reviewed on interlocutory appeal. See Johnson v. Jones, 115 S.Ct. 2151, 2156 (1995); see also *Armendariz v. Penman*, Nos. 93-55393, 93-55587, slip op. at 1125 (9th Cir. Feb. 7, 1996) (en banc).

We also lack jurisdiction over the councilmen's First Amendment defense under *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949). Cohen requires that an interlocutory order must meet a minimum of three conditions in order to be appealable: The order must (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. Id.; *Kuster v. Block*, 773 F.2d 1048, 1049 (9th Cir. 1985). Here, the order in question never conclusively determined the councilmen's First Amendment defense, which is wholly separate from their qualified immunity defense.

Therefore, we lack jurisdiction to consider it on this interlocutory appeal. See *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1984) (limiting interlocutory appeal to review of qualified immunity defense).

Accordingly, we address only appellants' claim that the law regarding application of the Fair Housing Act to the handicapped was not clearly established, and appellants' argument that they are entitled to qualified immunity on the claim that appellants violated the McClures' substantive and procedural due process rights in violation of 42 U.S.C. § 1983.

II.

If appellants can demonstrate that the law regarding the Fair Housing Amendments Act was not clearly

established at the time they acted, then they are entitled to qualified immunity. Appellants are "charged with knowledge of constitutional developments at the time of the alleged constitutional violation, including all available case law." *Lum v. Jensen*, 876 F.2d 1385 (9th Cir. 1989), cert. denied, 493 U.S. 1057 (1990). "A right can be clearly established even if there was no binding precedent in this circuit." Id. Absent binding circuit precedent the panel must look to "all available decisional law, including the law of other circuits and district courts, to determine whether the law was clearly established." Id. However, the mere existence of case law may not be enough to clearly establish the law. See id. at 1389 (where there is no binding precedent in this circuit and no Supreme Court precedent, and where a conflict among the circuits exists, the court held the right had not been clearly established). The McClures sued appellants under three sections of the FHAA--42 U.S.C. §§ 3604(f)(1), 3604(f)(3)(B), and 3617. Each statute is analyzed in turn.

A.

Section 3604 is a part of the Fair Housing Amendments Act (FHAA), which was enacted by Congress in 1988 and became effective on March 12, 1989. See Pub.L. No. 100-430, 102 Stat. 1619. Section 3604(f)(1) makes it unlawful

> [t]o discriminate in the sale or rental, or to otherwise
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> make unavailable or deny, a dwelling to any buyer or renter because of a handicap of--
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> (A) that buyer or renter;
>
> (B) a person residing in or intending to

reside in that dwelling after it is sold, rented, or made available; or

(C) any person associated with that buyer or renter. 42 U.S.C. § 3604(f)(1).

The alleged conduct of the Long Beach building officials and councilmen occurred from July through October 1990, only a little over a year after § 3604(f)(1) became effective. By that time, no published opinion of this circuit had discussed the meaning of "to otherwise make unavailable or deny" under § 3604(f)(1), and whether it includes a city's revocation of building permits and other enforcement of its building code for violations of that code. The few district court cases from other circuits that had considered this section by that time fail to provide clearly established law governing such conduct. See *Association of Relatives & Friends of AIDS Patients (A.F.A.P.S.) v. Regulation and Permits Admin.*, 740 F.Supp. 95 (D.P.R. 1990); *Baxter v. City of Belleville*, 720 F.Supp. 720 (S.D.Ill. 1989). These cases do not provide much discussion of what conduct falls within "to otherwise make unavailable or deny." Moreover, unlike those cases, this case does not involve a denial of a special use permit, where the applicant's building had otherwise been in compliance with the city's building regulations. The McClures were granted building permits and admit that their properties failed to comply with several aspects of the building code. The McClures contend that the city's revocation of permits and other enforcement of the building code is comparable to the denial of a special use permit. What is different in this case, however, is that the buildings intended for housing were in violation of the building code and could have been unsafe for use. This case presents a closer issue of discrimination under s 3604(f)(1) than the denial of a special use permit to an applicant whose

building is safe and ready for use, because the city, not to mention the handicapped people who are to inhabit the buildings, has a valid interest in safe housing.

The McClures attempt to analogize the right protected by § 3604(f)(1) to the well-established right protected by § 3604(a) to be free from discrimination and argue that case law regarding § 3604(a) provides clearly established law regarding § 3604(f)(1) given that both sections include the language "otherwise make unavailable or deny." The McClures' argument defines the right at issue at a level of generality that the Supreme Court has rejected. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The question of qualified immunity requires a particularized analysis, which cannot be answered by simply finding an abstract right to be free from discrimination in housing. See *Lum v. Jensen*, 876 F.2d at 1386. None of the cases cited by the McClures involves the circumstance where a property owner, whose property is not in compliance with a city's building code, asserts a claim under § 3604 for the discriminatory enforcement of the building code. Nor have the McClures pointed to any case which provides clear guidance for future cases as to the meaning of "otherwise make unavailable or deny." In *Keith v. Volpe*, we noted that the standard for proving discrimination under § 3604(a) was not established in this circuit and was in some disagreement among other circuits. 858 F.2d 467, 482-83 (9th Cir. 1988), cert. denied. 493 U.S. 813 (1989). Case law subsequent to the conduct of the officials here confirms our conclusion that the law regarding s 3604(f) was--and is--unsettled. See, e.g., *Growth Horizons, Inc. v. Delaware County, Pa.*, 983 F.2d 1277, 1282-84 (3d Cir. 1993); *Michigan Protection and Advocacy Service, Inc. v. Babin*, 18 F.3d 337, 344-45 (6th Cir. 1994); *Bryant Woods Inn, Inc. v. Howard County, Md.*, 911 F.Supp.

918, 929-39 (D.Md. 1996). Given the recent enactment of § 3604(f)(1) and the relative dearth of case law interpreting it, a reasonable official would not have known by clearly established law whether § 3604(f)(1) makes it unlawful for an official to enforce, with a discriminatory motive, the building code for violations of the code by a property owner who planned to open up the building as housing for the handicapped. Consequently, the appellants are entitled to qualified immunity with respect to this claim.

B.

We have found no case law from 1988-1990 in or outside this circuit which discusses the application of § 3604(f)(3) to the handicapped. Accordingly, because no law was clearly established as to this section, we find appellants are entitled to qualified immunity as to this claim.

C.

Section 3617 makes it unlawful to

> coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any rights granted or protected by section 3603, 3604, 3605, or 3606 of this title.

Courts have at times applied § 3617 broadly. See *United States v. City of Hayward*, 36 F.3d 832, 835 (9th Cir. 1994), cert. denied, 116 S.Ct. 65 (1996). The qualified immunity standard, however, is a particularized one: "The contours of the right must be sufficiently clear that a

reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 488 U.S. 635, 640 (1987). At the time of the alleged conduct here, § 3617 had not been applied in this circuit to any situation of "interference" with a right protected by § 3604(f) for the handicapped. Only one district court from another circuit had considered such a claim with respect to a § 3604(f) right. See *Baxter v. City of Belleville*, 720 F.Supp. 720, 733 (S.D.Ill. 1989). Nor had § 3617 been applied to cover a city's enforcement of its building code for violations of that code for either the handicapped or any other protected class under the statute. Just as with the law regarding § 3604, we hold that the law governing § 3617 was not sufficiently clear to have informed a reasonable official in July through October 1990 that enforcement of the building code for violations of the code could be actionable "interference" under that section if done with some discriminatory intent.

III.

The McClures contend that appellants violated their substantive and due process rights in violation of 42 U.S.C. § 1983. We disagree.

A.

The McClures' contention that defendants violated their substantive due process rights implicates the McClures' alleged property rights. As such, it is a claim governed by the criteria of the Fourth Amendment, *Soldal v. Cook County*, 113 S.Ct. 538, 548 (1992), Armendariz, slip op. at 1146, and is therefore properly maintainable, if at all, only as a Fourth Amendment claim. *Albright v. Oliver*, 114 S.Ct. 807, 813 (1994); *Graham v. Connor*, 490 U.S. 386, 395 (1989). Consequently, as pled, it must be dismissed.

B.

The McClures also claim their procedural due process rights were violated when their building permits and fire clearance were revoked and when their gas meters were removed by order of the City's Building Department. Defendants argue that the McClures have failed to exhaust their administrative remedies; specifically, defendants point out that under Long Beach Municipal Code § 18.20.100, the McClures could have appealed the City's actions to the Board of Examiners, Appeals and Condemnation. In that appeal, the legality of the City's acts could have been decided.

The McClures admit that, although they had counsel, they did not take advantage of the appeals process, but claim that they did not do so because they were misled by Superintendent Eugene Zeller. The McClures' admission is fatal to this claim. The existence of a post-deprivation procedure is sufficient remedy for the alleged violation of property rights. *Brogan v. San Mateo County*, 901 F.2d 762, 764 (9th Cir. 1990). There was and is no established law that the denial that a remedy exists by a city official not charged with implementation of the remedy itself is a denial of due process. See *Kerly Industries, Inc. v. Pima County*, 785 F.2d 1444, 1446 (9th Cir. 1980).

IV.

We also find that appellants are entitled to qualified immunity as to the McClures' 42 U.S.C. §§ 1985 and 1986 claims. First, to satisfy the standing requirements of Section 1985(3), appellants must demonstrate that they are members "of a class that the government has determined requires and warrants special federal assistance in protecting their civil rights." *Maynard v. City of San Jose*, 37 F.3d 1396, 1403

(9th Cir. 1994). Although in passing the Americans with Disabilities Act Congress has indicated that the handicapped constitutes a special class deserving protection, appellants are not themselves disabled. They merely seek to build homes for the disabled. As such, we find that appellants lack standing to proceed under this statute.

Second, we note that Section 1986 is predicated on asserting a valid § 1985 claim. *Trerice v. Pedersen*, 769 F.2d 1398, 1403 (9th Cir. 1995). Because appellants cannot proceed under Section 1985, we find that they are also unable to assert a claim under § 1986.

CONCLUSION

We DISMISS for lack of jurisdiction the appellants' claims that (1) the McClures failed to raise a genuine issue of material fact as to whether appellants violated the McClures' rights under the Fair Housing Act, and (2) the McClures failed to raise a genuine issue of material fact as to whether appellants deprived the McClures equal protection of law. As to the Fair Housing Act, due process, Section 1985, and Section 1986 claims, we REVERSE the district court's denial of summary judgment and find that appellants are entitled to qualified immunity.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHIRLEY and JASON McCLURE, Plaintiffs vs. CITY OF LONG BEACH, et al., Defendants.	No. CV 92-2776 JSL ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT; AND DENYING PLAINTIFFS' MOTIONS FOR RECONSIDERATION AND TO AMEND THE FIRST AMENDED COMPLAINT (FILED NOVEMBER 28, 1994)

The Motions of defendants City of Long Beach, et al. for Summary Judgment and the Motions of plaintiffs Shirley and Jason McClure for Reconsideration and to Amend the First Amended Complaint were decided without hearing on November 14, 1994.

Having reviewed the papers filed in connection with this matter and being fully apprised of the relevant facts and law,

IT IS HEREBY ORDERED that the Motions of defendants City of Long Beach, et al.:

(1) be GRANTED with respect to:

(a) the 42 U.S.C. § 1983 claim with respect to defendants Clifford Ashton, William Gatoff, Marty De Angelo, Harold Liddicoat and Mark Sutton;

(b) the 42 U.S.C. § 1985 claim with respect to defendants Clifford Ashton, William Gatoff, Marty DeAngelo, Harold R. Liddicoat and Mark Sutton;

(c) the 42 U.S.C. §1986 claim with respect to defendants Clifford Ashton, William Gatoff, Marty DeAngelo, Harold Liddicoat and Mark Sutton;

(d) all claims brought against defendant Dick McNicholl;

(e) all claims brought against defendant Don Westerhoff;

(2) be DENIED with respect to all remaining claims:

IT IS FURTHER ORDERED that the Motions of plaintiffs for Reconsideration and to Amend the First Amended Complaint be DENIED.

IT IS SO ORDERED.

DATED: 11/23/94

Spencer Letts
J. Spencer Letts
United States District Judge

42 U.S.C. § 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by § 3603 of this title and except as exempted by §§s 3603(b) and 3607 of this title, it shall be unlawful--

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the

neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of--

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of--

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes--

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such

modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental. the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services. when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13. 1988. a failure to design and construct those dwellings in such a manner that--

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).

(5)(A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local

government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

(6)(A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to § 3610(f)(3) of this title to receive and process complaints or otherwise engage in enforcement activities under this subchapter.

(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this subchapter.

(7) As used in this subsection, the term "covered multifamily dwellings" means--

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

(B) ground floor units in other buildings consisting of 4 or more units.

(8) Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this subchapter shall be effective, that requires dwellings to be

designed and constructed in a manner that affords handicapped persons greater access than is required by this subchapter.

(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

42 U.S.C. § 3617. Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by § 3603, 3604, 3605, or 3606 of this title.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute. ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected. any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Cal. Health & Safety Code § 1569.82

§ 1569.82. Legislative declaration; application of article; "six or fewer persons" defined

The Legislature hereby declares that it is the policy of this state that each county and city shall permit and encourage the development of sufficient numbers of residential care facilities for the elderly as are commensurate with local need.

This article shall apply equally to any chartered city, general law city, county, city and county, district, and any other local public entity.

For the purposes of this article, "six or fewer persons" does not include the licensee or members of the licensee's family or persons employed as facility staff.

Cal. Health & Safety Code § 1569.85

§ 1569.85. Facility serving six or fewer persons; consideration as residential use; application of local regulations

Whether or not unrelated persons are living together, a residential care facility for the elderly which serves six or fewer persons shall be considered a residential use of property for the purposes of this article. In addition, the residents and operators of the facility shall be considered a family for the purposes of any law or zoning ordinance which relates to the residential use of property pursuant to this article.

For the purpose of all local ordinances, a residential care facility for the elderly which serves six or fewer persons shall not be included within the definition of a boarding house, rooming house, institution or home for the care of the aged, guest home, rest home, sanitarium, mental hygiene home, or other similar term which implies that the residential care facility for the elderly is a business run for profit or differs in any other way from a family dwelling.

This section shall not be construed to forbid any city, county, or other local public entity from placing restrictions on building heights, setback, lot dimensions, or placement of signs of a residential care facility for the elderly which serves six or fewer persons as long as the restrictions are identical to those applied to other family dwellings of the same type in the same zone.

This section shall not be construed to forbid the application to a residential care facility for the elderly of any local ordinance which deals with health and safety, building

standards, environmental impact standards, or any other matter within the jurisdiction of a local public entity if the ordinance does not distinguish residential care facilities for the elderly which serve six or fewer persons from other family dwellings of the same type in the same zone; and if the ordinance does not distinguish residents of the residential care facilities for the elderly from persons who reside in other family dwellings of the same type in the same zone.

No conditional use permit, zoning variance, or other zoning clearance shall be required of a residential care facility for the elderly which serves six or fewer persons which is not required of a family dwelling of the same type in the same zone.

Use of a family dwelling for purposes of a residential care facility for the elderly serving six or fewer persons shall not constitute a change of occupancy for purposes of Part 1.5 (commencing with Section 17910) of Division 13 or local building codes. However, nothing in this section is intended to supersede Section 13143 or 13143.6, to the extent these sections are applicable to residential care facilities for the elderly providing care for six or fewer residents.

For the purposes of this section, "family dwelling." includes, but is not limited to, single-family dwellings, units in multifamily dwellings, including units in duplexes and units in apartment dwellings, mobilehomes, including mobilehomes located in mobilehome parks, units in cooperatives, units in condominiums, units in townhouses, and units in planned unit developments.

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure

him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws: or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States: or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

§ 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Supreme Court, U.S.
FILED
JUN 18 1997
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No. 96-1758

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

SHIRLEY and JASON McCLURE,

Petitioners,

v.

THE CITY OF LONG BEACH, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly held that respondents were entitled to qualified immunity in connection with their alleged violation of petitioners' rights under 42 U.S.C. § 3604 and 42 U.S.C. § 3617, in light of the well-recognized ambiguities in these statutes, and the fact that there was no closely analogous case law interpreting their provisions prior to respondents' alleged acts.

2. Whether the Ninth Circuit correctly held that respondent Zeller was entitled to qualified immunity in connection with his alleged violation of petitioners' procedural due process rights, give the circuit court's finding that petitioners failed to exhaust the administrative requirements necessary to pursue a due process claim.

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STATEMENT OF THE CASE

Petitioners' Petition for Writ of Certiorari (the "Petition") contains a purported "Statement of the Case" which is both irrelevant and inaccurate. The Ninth Circuit below held that this Court's decision in Johnson v. Jones, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), established that factual disputes connected to the qualified immunity analysis could not be resolved on appeal, and that the issue before the court was the essentially legal question of whether the law respondents allegedly violated clearly prohibited their conduct. [See Petition at App.-3 to App.-4.] Because petitioners' recitation of the supposed facts of this case is irrelevant to this issue, respondents will not address the inaccuracies contained therein. However, respondents note that the relevant factual scenario for purposes of the qualified immunity analysis is that set forth by the Ninth Circuit, to wit, whether, at the time of respondents' alleged acts, it was clearly established that the Fair Housing Amendments Act ("FHAA") prohibited city officials from enforcing the building code and remedying admitted health and safety violations, if it is alleged that they had some discriminatory motive for doing so. [Petition at App.-6.] Nowhere does petitioners' factual statement mention or address the Ninth Circuit's finding that petitioners' properties did not comply with the building code, and that these health

and safety violations could have made the properties unsafe for their prospective occupants. [Id.]

ARGUMENT

I. The Requirements Necessary For Certiorari Do Not Exist In This Case.

Rule 10 of the Supreme Court Rules provides that review on writ of certiorari is a matter of judicial discretion, and will be granted only when there are special and important reasons for review. This rule lists the following three circumstances under which a writ of certiorari may be granted: (1) where a decision of a federal appellate court conflicts with a decision of a sister court or state court of last resort on the same matter; (2) where a decision of a state court of last resort decides a federal question in a way that conflicts with another state court of last resort or a federal appellate court; or (3) where a state or federal appellate court has decided an important question of federal law which has not been or should be settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. Because none of these three criteria are satisfied here, certiorari should not be granted.

First, the Ninth Circuit's decision in this case does not conflict with the opinion of any other circuit court. In fact,

as explained below, this decision is entirely consistent with the opinions of other circuits on the issues presented.

Second, there is no state court decision involved here, and the opinion below does not conflict with any decision of a state court of last resort.

Third, the opinion below does not conflict with any decision of this Court, and there is no important question of federal law which must be resolved by the Court. In order to satisfy this latter criteria, the matter at issue must be important to the public in general, as distinguished from merely being important to the parties to the case. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.Ed. 712 (1923); Rice & Sioux City Cemetery, 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed. 897 (1955). See also, Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994) (Court will not grant review unless issue is important outside the context of the particular litigation, even if doing so is necessary to correct appellate error and ensure justice). Here, however, the Ninth Circuit's opinion is unpublished, has no precedential value whatsoever, and its effect is limited to the parties to this one case. Even if this were not true, the issue is whether respondents are entitled to qualified immunity under the circumstances of this case, a decision which is based not only on the applicable law, but on the specific

situation and conduct at issue here. Moreover, with respect to the only issue that might arguably have any effect beyond this one case--whether qualified immunity applies to Fair Housing Act claims--the Ninth Circuit's opinion is in accord with every other published decision on this topic. In short, because this case does not involve the type of broad-ranging or important federal question which might justify review by this Court, the Petition should be denied. Furthermore, as explained below, even if petitioners could somehow overcome this fatal defect (which they cannot), there is no need for the Court to review the Ninth Circuit's decision, because this case was correctly decided and is in accord with other published decisions on the topic of qualified immunity under the FHAA.

II. Petitioners' Claims Under The FHAA Are Barred By Qualified Immunity.

A. Qualified Immunity Applies To FHAA Cases.

The Petition asserts that qualified immunity does not apply to the FHAA, despite the fact that every court which has addressed this issue has held that immunity is a defense to a Fair Housing Act claim. See, e.g., Meadowbriar Home for Children, Inc. v. Gunn, 81 F.3d 521, 531-32 (5th Cir. 1996) (city officials are entitled to qualified immunity under the FHAA because the "otherwise make unavailable" provision of the statute is unclear, and, "as of 1990, there

were no federal cases or regulations holding that the 'otherwise make unavailable or deny' language imposed personal liability upon officials who have decision-making authority"); Armandariz v. Penman, 31 F.3d 860, 868-69 (9th Cir. 1994) and 75 F.3d 1311, 1316 (9th Cir. 1996) (holding that government defendants had qualified immunity with respect to the plaintiffs' Fair Housing Act claims); O'Neal v. Alabama Dept. of Public Health, 826 F.Supp. 1368 (M.D. Ala. 1993) (state health officer who refused to allow Alzheimer's sufferers to remain at assisted living facility was entitled to qualified immunity because he could have reasonably believed that his actions were lawful); United States General Inc. v. City of Joliet, 432 F.Supp. 346, 355 (N.D. Ill. 1977) (recognizing that city officials could assert good faith immunity as a defense to a Fair Housing Act claim under appropriate factual scenario); United States v. City of Hayward, 36 F.3d 832, 838 (9th Cir. 1994) (arbitrator entitled to absolute immunity under the Fair Housing Act); Baytree of Inverrary Realty v. City of Lauderdale, 873 F.2d 1407, 1409 (11th Cir. 1989) (denial of zoning application is a legislative function entitling government official to absolute immunity). Moreover, even assuming arguendo that it is unclear whether qualified immunity is a defense to a FHAA claim, that fact alone establishes that respondents are

entitled to immunity, since the law in this area is not clearly established.

Equally disingenuous is petitioners' claim that there is no policy reason to apply qualified immunity to a "comprehensive remedial statute" such as the FHAA. Although petitioners have, of their own accord, dubbed the FHAA a "comprehensive remedial statute" which "spells out in detail its provisions and requirements," they have offered no authority for this proposition, and have completely ignored the fact that (as explained below) the courts and commentators have repeatedly recognized that the FHAA is ambiguous and unclear in several important respects.[1] In addition, contrary to petitioners' contentions, there are clear policy reasons for applying qualified immunity to FHAA claims. As this Court pointed out in Owen v. City of Independence, 445 U.S. 622, 655-56, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), the policy which underlies the doctrine of qualified immunity is "the concern that the threat of personal monetary liability will introduce an unwarranted and unconscionable consideration into the decision making

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[1] As such, petitioners misstate the issue when they attempt to pretend that the question here is whether case law must be decided prior to imposing liability under an "unambiguous" statute. It is precisely because the FHAA is unclear that case law is needed to interpret it.

process, thus paralyzing the governing official's decisiveness and distorting his or her judgment on matters of public policy." Clearly, that policy is just as applicable when a public official is sought to be held personally liable under the FHAA as when he or she is sought to be held personally liable under some other federal statute or the United States Constitution.

Petitioners also make much of the fact that FHAA imposes respondeat superior liability and applies to both public and private actors, whereas 42 U.S.C. § 1983 does not. Not only do petitioners fail to explain how or why this has any bearing on the qualified immunity analysis, their assertions in this regard are factually and legally inaccurate. Contrary to petitioners' representations, private parties can be held liable under 42 U.S.C. § 1983, yet not be entitled to qualified immunity. Wyatt v. Cole, 504 U.S. 158, 167-168, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992). In addition, there is obviously a policy reason for allowing qualified immunity to government actors in such cases while denying it to private persons, to wit, the threat of personal liability "paralyzing the governing officials decisiveness and distorting his or her judgment on matters of public policy." Owen, supra, at 655-56; Wyatt, supra, at 1833.

Similarly disingenuous is petitioners' claim that the concept of qualified immunity only makes sense in the

context of section 1983 claims, and is illogical in the context of statutory rights. By definition, all section 1983 claims arise by virtue of the defendant's alleged violation of a federal constitutional or statutory provision. In the latter case, if the underlying federal statute that gives rise to the § 1983 claim is unclear, the defendant is obviously entitled to qualified immunity. Otherwise an individual government defendant could be held liable for violating an ambiguous statute--a concept completely at odds with the doctrine of qualified immunity.

B. Respondents' Entitlement To Qualified Immunity Cannot Be Decided In The Abstract, Without Reference To The FHAA.

Petitioners contend that the determination as to whether their rights were clearly established can be decided in the abstract, without any reference to the provisions of the FHAA. However, this Court has specifically held that the qualified immunity analysis must focus on "the federal right on which the claim for relief is based," not on some other "clearly established duty." Elder v. Holloway, 510 U.S. 510, 114 S.Ct. 1019, 1022, 127 L.Ed.2d 344 (1994). In fact, as the Ninth Circuit recognized below: (1) the question of qualified immunity requires a particularized analysis of the law at issue, not some "abstract right to be free from discrimination in housing"; (2) petitioners here seek to define the right at issue "at a level of generality that the

Supreme Court has rejected"; (3) the FHAA was enacted just one year prior to respondents' acts, for the first time outlawing housing discrimination against the handicapped; and (4) the provisions of the FHAA were themselves unclear, and had not been interpreted or applied under circumstances similar to the present prior to respondents' alleged acts. [App.-6 to App.-8.]

C. Respondents Are Entitled To Qualified Immunity Under § 3604(f).

1. Section 3604(f)(1) Does Not Clearly Define The Type Of Conduct Which Makes Housing "Unavailable" To Handicapped Persons.

Petitioners contend that the provision in § 3604(f)(1) which prohibits conduct which "otherwise make[s] [housing] unavailable" to handicapped individuals is clear because: (1) two cases decided in other circuits[2] years after respondents' alleged acts have broadly interpreted the FHAA; and (2) this provision duplicates the language of 42 U.S.C. § 3604(a) on this topic. The former contention overlooks the fact that case law decided years after respondents' alleged acts is irrelevant to the qualified immunity analysis. Harlow v.

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[2] LeBlanc Sternberg v. Fletcher, 67 F.3d 412, 424 (2d Cir. 1995); Helen L. v. Di Dario, 46 F.3d 325, 333 n.14 (3rd Cir. 1995).

Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The latter assertion ignores the Ninth Circuit's finding that, at the time of respondents' alleged acts, "the standard for proving discrimination under § 3604(a) was not established in this circuit and there was some disagreement among other circuits" on this topic. [App.-7 to App.-8.]

In fact, petitioners completely disregard the acknowledged difficulty and confusion that the courts and commentators have experienced, and continue to experience, in interpreting the FHAA. See e.g., Meadowbriar, supra, 81 F.3d 521, 531-32 (5th Cir. 1996) (city officials are entitled to qualified immunity under the FHAA because the "otherwise make unavailable" provision of the statute is unclear, and, "as of 1990, there were no federal cases or regulations holding that the 'otherwise make unavailable or deny' language imposed personal liability upon officials who have decision-making authority")[3]; Michigan Protection and Advocacy Service, Inc. v. Babin, 799 F.Supp. 695, 711-14 (E.D. Mich. 1992) and 18 F.3d 337 (6th Cir.

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[3] The Petition misstates the holding in Meadowbriar. Rather than "conceding" that individual city officials could be held liable under the FHAA, the court held that it was unclear whether the legislature intended to hold city officials who have decision-making authority personally liable under the FHAA.

1994) (concluding that the "make unavailable" provision only applies to individuals who are in a position "directly to make housing unavailable," i.e., sellers, their agents, or other persons or entities integrally involved in the sale or financing of real estate); Schwemm, Housing Discrimination, § 13.4(1) (1994) (the meaning of the prohibition "which makes it unlawful to 'otherwise make unavailable or deny' a dwelling on discriminatory grounds is not entirely clear"); Familystyle of St. Paul v. City of St. Paul, Minn., 923 F.2d 91, 94 (8th Cir. 1991) (city zoning ordinances limiting housing choices for the handicapped did not make housing unavailable because it did not directly prohibit handicapped persons from purchasing, renting or occupying a private resident or dwelling); Growth Horizons Inc. v. Delaware County, PA., 983 F.2d 1277, 1282-1283 (3d Cir. 1993) (city's termination of a contract with a corporation that provided housing to handicapped individuals, and its refusal to assume the corporation's leases for that housing, did nor directly make unavailable or deny housing to handicapped individuals); Bryant Woods Inn, Inc. v. Howard County, Md., 911 F.Supp. 918, 929-39 (D. Md. 1996). Although petitioners attempt to distinguish these cases on factual grounds, doing so misses the point. The issue for purposes of qualified immunity is not whether the facts of these cases are distinguishable. The issue is whether the law was clearly

established, and the fact that both these courts and the Ninth Circuit continue to find the law confusing years after respondents' alleged acts, definitively establishes that it was not.[4]

2. Section 3604(f)(3)(B) Was Not Clearly Established.

Petitioners also cannot show that § 3604(f)(3)(B) was clearly established at the time of respondents' alleged acts. This provision merely defines the term "discrimination" contained in § 3604(f) to include a failure to make reasonable accommodations. As such, because the applicable provision of § 3604(f) [in this case, § 3604(f)(1)], is ambiguous, so is § 3604(f)(3)(B).

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[4] Petitioners also argue that respondents violated California law as embodied in the Health and Safety Code. Even assuming arguendo that this were true (which it is not), a violation of state law does not establish a violation of the FHAA. Likewise irrelevant is petitioners' claim that, because respondents' conduct allegedly violated the equal protection clause, they also should have known that it violated the FHAA. As explained above, petitioners must prove that respondents' conduct clearly violated the FHAA, not some other statutory or constitutional provision.

Moreover, as the Ninth Circuit noted, there was no case law prior to 1990 which discussed the reasonable accommodation provision of § 3604(f)(3)(B). [App.-8.] Petitioners nonetheless contend that this statutory provision was clearly established at the time of respondents' alleged acts because, subsequent to 1990, some courts have: (1) held that the standards for reasonable accommodation under § 504 of the Rehabilitation Act of 1973 should also apply to claims under § 3604(f)(3); and (2) interpreted the reasonable accommodation clause to impose an affirmative duty on City officials to avoid excluding group living arrangements. Petitioners' argument is meritless for several reasons.

First, the earliest cases cited by petitioners were decided in 1994, over four years after respondents' alleged acts. As such, they are irrelevant to the qualified immunity analysis.

Second, the cases cited by petitioners involved things such as zoning laws or residency fees, not a case where City officials were attempting to remedy uncontroverted health and safety violations that they had a legal duty to correct. The reasonable accommodation provision of § obviously did not entitle petitioners to violate the building code and thereby endanger the health and safety of potential residents of their properties.

Third, petitioners completely ignore the courts' and commentators' acknowledged confusion, years after respondents' alleged acts, as to whether § even applies in cases such as the present. See O'Neal v. Alabama, 826 F.Supp. 1368, 1376 (M.D. Ala. 1993); Schwemm, Housing Discrimination, § 11.5(3)(c) (1994) (noting that the reasonable accommodation provision is new and untested, and that a good deal of litigation will be needed to define its parameters and resolve whether it even applies in "group home" cases).

D. Respondents Are Entitled To Qualified Immunity Under § 3617.

The Ninth Circuit held that 42 U.S.C. § 3617 was unclear for the same reasons as 42 U.S.C. § 3604(f), to wit, that liability under § 3617 was premised on a violation of 3604, and, at the time of the alleged conduct at issue here, the law was unclear as to: (1) what constituted "interference" with a right protected by § 3604; and (2) whether enforcement of admitted building code violations was actionable "interference" if undertaken with some discriminatory motive.

Petitioners contend that the Ninth Circuit's decision is erroneous because it focused on their building code violations, rather than on their supposed unspecified claims of "harassment and intimidation." Not only does this

assertion ignore the interrelationship between these two concepts (to wit, petitioners' claim that respondents harassed and intimidated them by enforcing the building codes, and that it was this enforcement activity that allegedly "made housing unavailable" to them), petitioners are essentially asking this Court to review the record and hold that the appellate court misunderstood or misinterpreted the facts of this case. This is clearly not the function of review by writ of certiorari. Layne, supra; Rice, supra; Ticor Title Ins. Co., supra.

III. Respondents Did Not Violate Petitioners' Clearly Established Due Process Rights.

The Ninth Circuit below held that petitioners could not assert a procedural due process claim against respondents because, by neglecting to appeal respondents' actions pursuant to Long Beach Municipal Code § 18.20.100, they failed to exhaust the administrative remedies necessary to pursue a due process claim. The court also rejected petitioners' excuse for failing to pursue an appeal--that they believed they did not have to do so based on the statements of respondent Zeller--on the ground that there was no clearly established law allowing a procedural due process claim against an official who allegedly denies a particular remedy (in this case, an appeal),

if the official is not charged with implementation of that remedy.

Petitioners take issue with this holding, on the grounds that: (1) the Ninth Circuit erred in finding that respondent Zeller was not charged with implementing their appeal (even though the Long Beach Municipal Code clearly provides to the contrary); and (2) in their opinion, pursuing an appeal would have been futile. In addition to being an inaccurate rendition of events, petitioners are asking this Court to grant certiorari to decide issues of fact. However, as explained above, in order to be entitled to review by certiorari, petitioners must show that there is an important question of federal law that must be decided by this Court, not simply that they disagree with the Ninth Circuit's factual findings. Layne, supra; Rice, supra; Ticor, supra.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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